IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12467 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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BHAGWANBHAI RAGHUNATHBHAI CHAUDDHARY

Versus

DISTRICT PRIMARY EDUCATION OFFICER

Appearance:

MS SHALINI S MAIR for Petitioner No. 1
MR HS MUNSHAW for Respondent No. 1
RULE SERVED for Respondent No. 2
MR HD DAVE, ASST. GOVT. PLEADER for Respondent No. 3

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 05/09/2002

ORAL JUDGEMENT

1. This is a petition under Article 227 of the

Constitution of India, though styled as a petition under Article 226 of the Constitution, for enforcement of fundamental rights under Article 14 of the Constitution.

1.1 The petitioner herein challenges the order of termination of service of the petitioner passed by the District Primary Education Officer, ultimately confirmed in appeal by the Director of Primary Education. Obviously, therefore, this is a petition under Article 227 of the Constitution since the petitioner challenges the orders passed by the statutory authorities in the performance of their quasi-judicial functions.

1.2. Before proceeding further on the merits of the matter it is desirable to keep in mind the observations of the Supreme Court in the case of (i) Mohmmad Yunus Vs. Mohammad Mustaqim (AIR 1984 SC 38, (ii) Khalil Ahmed Bashir Vs. Tufelhussein S. Sarangpurwala (AIR 1988 SC 184) and (iii) Ashok Kumar Vs. Sita Ram (2001(4) SCC 478) on the question of the scope and ambit of the jurisdiction of this Court in the context of the powers which this Court may exercise under Article 227 of the Constitution. The Supreme Court has observed in the aforesaid cases that the High Court, while examining a petition under Article 227 of the Constitution of India, cannot reappreciate the evidence and cannot disturb the findings of fact recorded by the courts below except where the same are perverse, and even errors of law cannot be corrected. Suffice it to say that this Court cannot enter into the quality of the decisions rendered; at best, it may only examine the decision making process adopted by the fora below.

2. The petitioner herein was appointed as an Assistant Teacher after going through the selection procedure. Admittedly, the selection procedure consist only of evaluation of qualifications. This evaluation is on the basis of documents submitted by the applicants for the purpose of selection and appointment.

2.1 At the time of making the application for selection and appointment, the petitioner had submitted documents showing qualifications possessed by him. The petitioner claimed that he held a Diploma in Tailoring and Cutting, and that he had also passed the new S.S.C. examination.

2.2 It is pertinent to note that the petitioner's qualification supported by the certificate that he has been granted a Diploma in Tailoring and Cutting, was in fact submitted, that this is not in dispute on either

side.

2.3 However, at the time of application and at the time of selection, the applicant had not submitted the relevant certificate showing that he has passed the new S.S.C. examination. It is common ground that even thereafter, this certificate has not been produced at any stage till the present.

2.4 However, what the petitioner did produce was a mark sheet of the marks obtained by him in the S.S.C. examination. It is this mark sheet which is the cause and the basis of the present controversy before the Court.

3. The concerned authority, after assessing the qualifications claimed and asserted by the petitioner, and as supported by the documents produced by him at the relevant point of time as mentioned hereinabove, appointed the petitioner as an Assistant Teacher. It is pertinent to note that as 30 appointments were made on the basis of the internal evaluation based on the qualifications possessed by the candidates, the petitioner was also appointed, being placed at Sl. No.26 in the list of selected candidates. The appointment was made on 15th November 1986.

4. It appears that thereafter the respondent authorities received complaints that the petitioner has obtained the selection and appointment on the basis of fraudulent certificates and that the petitioner had in fact not passed the S.S.C. examination at all. Consequently, the petitioner was directed in writing to remain present with the relevant certificates for the purpose of verification of the same.

5. The petitioner has contended in the petition that he was required in writing to remain present with the original documents, viz. the original S.S.C. passing certificate and the original mark sheet for the said examination, by letters dated 24th March 1995, 14th September 1995 and 4th November 1995. However, as the respondent has pointed out in the affidavit-in-reply, the first of such notices was issued on 4th January 1992, which the petitioner has conveniently not referred to in the petition. This first notice has been produced by the by the Respondent No.1 along with its affidavit-in-reply at page 50. This notice specifically contemplates that the mark sheet produced by the petitioner appears to have been tampered with, which requires to be looked into and verified. He was, therefore, required to remain present

on 16th January 1992, failing which it shall be deemed that the petitioner has nothing further to submit and further consequential action may follow. It is, therefore, obvious that this notice was in the nature of a show cause notice, that it pointed out to the petitioner that the mark sheet of the S.S.C. examination produced by the petitioner at the time of application and selection appeared to be not genuine and in case authentic documents were not produced in person on the specified date, further action would follow.

5.1 However, as stated in the petition itself, the petitioner did not comply with the first of such notices referred to above [dated 4th January 1992], which required the authorities to issue three further notices, viz. 24th March 1995, 14th September 1995 and 4th November 1995. It is pertinent to note that inspite of all these notices issued to the petitioner to produce the genuine mark sheet of the S.S.C. examination, which he did not, although he had remained present as required by the last three notices. Consequently, the District Primary Education Officer was constrained to pass the termination order at Annexure 'C'. In this context, it is pertinent to note that although he was required to produce the S.S.C. passing certificate, the petitioner did not do so, and in fact till today the same has not been produced. However, the petitioner has produced at Annexure 'K' to the petition, which is only a typed copy of the S.S.C. passing certificate. The said typed copy purports to be a true copy as certified by the Advocate at the bottom of the typed copy. However, the passing certificate is not the center of the controversy at all. This aspect, therefore, is not of much relevance since even at the stage of application and selection, the certificate of passing was not tendered to the authorities, and therefore, did not form the basis of the selection of the petitioner and his appointment.

6. The impugned order at Annexure 'C' points out that at the stage of application and selection, the petitioner had submitted a mark sheet in respect of the new S.S.C. examination, according to which the petitioner had obtained 486 marks out of 800. Further, this mark sheet submitted by the petitioner does not disclose the marks obtained in English inasmuch as the certificate which was produced contains ink blots and one such ink blot covers the space where the marks for English would have been shown. What is more important is that the said authority has noted in the order that inquiries in person were made with the Gujarat Secondary Education Board, and a duplicate mark sheet obtained.

This authentic mark sheet discloses that the petitioner has obtained 426 marks out of 800 marks and that in English he had obtained only 19 marks. Further, it may also be noted here that the fact that the petitioner had obtained only 19 marks in English is not of much relevance inasmuch as such marks did not weigh with the authorities at the time of selection. What is of paramount importance is that the mark sheet produced by the petitioner at the time of application and selection indicated that he had obtained 486 marks whereas the authentic certificate obtained directly from the Board shows that the petitioner had obtained only 426 marks. As a result of this finding, the said District Primary Education Officer found that the petitioner had submitted a bogus mark sheet and/or manipulated mark sheet with deliberate intent to obtain appointment. Consequently, the services of the petitioner were terminated by the said order.

7. Being aggrieved by the aforesaid order, the petitioner preferred an appeal, which was heard in accordance with law and decided by the Bench consisting of District Education Officer and Chairman of the District Education Committee.

7.1 So far as the District Education Officer is concerned, he has expressed the judgment and opinion upholding the findings of the District Primary Education Officer, and consequently decided to dismiss the appeal. However, the other member of the appellate authority, viz. the Chairman of the District Education Committee did not agree, and consequently delivered a separate opinion which is at Annexure "F-2" to the petition.

7.2 What requires to be noted at this stage is that the dissenting opinion expressed at Annexure "F.2", is merely a summary of the submissions made by the petitioner in the appeal, without in any manner whatsoever giving reasons why such submissions are required to be accepted. Even otherwise, the last sentence of Annexure "F.2" is significant wherein the dissenting member of the appellate authority has merely stated that the case of the petitioner requires sympathetic consideration so that no injustice is done to him and that this request is addressed to the Director of Primary Education.

7.3 Consequently, in view of the apparently dissenting opinion expressed by one of the members of the Appellate Authority, the matter was placed before the Director of Primary Education who delivered his judgment

and order at Annexure 'G' to the petition. The sum and substance of the said order is only to the effect that the petitioner had submitted at the time of his application and selection the mark sheet in respect of new S.S.C. examination, which showed that he had obtained 486 marks out of 800 marks whereas in fact the authentic certificate issued by the Secondary Education Board shows that he had obtained only 426 out of 800 marks. This order, therefore, concluded that the petitioner had obtained the selection and appointment on the basis of a bogus mark sheet, and by mis-representation. For this reason, the order passed by the District Education Officer [Annexure 'F-1'] was confirmed, and the appeal was dismissed.

8. It is under these circumstances that the petitioner has approached this Court by the present petition wherein the ultimate order passed by the Appellate Authority at Annexure 'G', confirming the termination order passed by the District Primary Education Officer at Annexure 'C', is the subject matter of challenge.

9. The petitioner has contended that there was a violation of the principles of natural justice, that the initial order of termination of service at Annexure 'C' to the petition is consequently bad in law on the ground that the said order has been passed on "wrong grounds" inasmuch as the petitioner had no opportunity to meet the allegations made against him. In this context it was specifically submitted that the petitioner was merely asked to produce the S.S.C. passing certificate, for the non-production of which a reasonable explanation had been offered by the petitioner. It is also sought to be contended that merely by requiring the petitioner to produce the relevant certificates, which the petitioner was unable to do, does not put the petitioner to notice that the petitioner was required to meet the allegations of fraud or misrepresentation. These submissions cannot be sustained on the facts as found from the record. Such submissions have been made, and could perhaps be sustainable, only if we confine our attention to the facts as asserted in the petition and nothing further. There is no doubt that the second notice issued by the authorities on 24th March 1995 as also the third notice dated 14th September 1995 are only reiterations of the demand of the authorities to produce the original documents, and particularly the mark sheet of the S.S.C. examination. What the petitioner conveniently omits from consideration, and which the respondent No. 1 has brought on record along with its affidavit-in-reply [page

50] is the first show cause notice dated 4th January 1992. This show cause notice specifically states that the petitioner is required to remain present in the office on 16th January 1992 at 3.00 P.M. without fail, together with the original certificates and mark sheets, which the petitioner had produced at the application/selection stage. This specific demand was amplified by stating that those certificates and mark sheets produced by the petitioner at the relevant point of time appear to be tampered with, and, therefore, originals or authentic copies require to be produced by the petitioner. This notice also points out that if the petitioner fails to remain present and/or fails to produce the required documents, it shall be assumed that the petitioner has nothing to say in the matter, and consequential order will follow. Even a plain reading of this notice would, therefore, make it very clear even to a layman that the petitioner was informed that the documents, particularly the S.S.C. mark sheet, produced by him at the qpplication/selection stage appears to have been tampered with, and that therefore, he was required to satisfy the authority by production of the original, and/or authentic mark sheet in respect of the S.S.C. examination.

9.1 As aforesaid, the entire petition is completely silent as regards this first show cause notice.

9.2 As stated hereinabove, the second and the subsequent notice only reiterate the demand of the authorities that the petitioner produce the authentic documents as aforesaid. It may perhaps be acceptable that the petitioner was unable to produce the S.S.C. Passing certificate, which according to the learned counsel for the petitioner, has been produced with the petition. However, as aforesaid, it is merely a typed copy which has been endorsed as true copy by the learned counsel. In any case, it is not the S.S.C passing certificate which is the centre of the controversy.

9.3 The fact remains that the actual marks obtained by the petitioner in the new S.S.C. examination were 426 out of 800, as evidenced by the authentic mark sheet obtained directly from the Secondary Education Board whereas the mark sheet submitted by the petitioner shows that he had obtained 486 out of 800 marks. Even today before this Court, this factual situation cannot be controverted.

10. In order to meet this hurdle, learned counsel for the petitioner sought to urge that the mark sheet

actually and in fact produced by the petitioner at the application/selection stage was for 426 marks and that his selection and appointment was in fact made on the basis of 426 marks and not on the basis of 486 marks.

10.1 This contention cannot be entertained or accepted for a number of reasons. Firstly, this contention is raised for the first time in this Court at the argument stage. The petitioner has never contended before the District Primary Education Officer that his selection was on the basis of a mark sheet showing that he had obtained 426 marks. This contention was not raised before the Appellate Authority, and particularly not raised when the appeal was heard by the duly constituted Bench, and more over was also not raised when the matter was heard [due to difference of opinion] by the Director of Primary Education. In fact, this contention has not even been raised in the memo of the petition. In this context, learned counsel for the petitioner states that this contention has in fact been raised in paragraph 8 (ii) of the petition. On a reading of the said paragraph of the petition, I find that the said passage does not cover or raise the contention orally argued before me. The said passage does not assert as a statement of fact that the petitioner had produced the mark sheet at the relevant stage for 426 marks. The only contention raised in the said paragraph of the petition is that "even if the mark sheet of the Board is taken as basis then also petitioner would hope to get appointment as Assistant Primary Teacher".

10.2 Even otherwise, I am of the opinion that even if the said contention had in fact been raised in the present petition, the same could not have been entertained by this Court in the exercise of its jurisdiction under Article 227 of the Constitution. It is well settled law that no party to a proceedings under Article 227 of the Constitution can be permitted to make out a new case for the first time.

10.3 Even if another prospective is applied to the facts of the case, such a contention would not hold good. Even if the specific contention taken in paragraph 8 (ii) referred to above is considered, the consequence would nevertheless not be in favour of the petitioner. The petitioner has submitted on a hypothetical basis that even if the correct marks obtained by the petitioner were considered, he would nevertheless be qualified for selection and appointment.

10.4 This submission suffers from two infirmities.

Firstly, this submission proceeds on the basis that the actual selection and appointment obtained by the petitioner on the basis of fraudulent documents can be over-looked and that the marks actually obtained by the petitioner can now be made the basis for confirming that selection and appointment which was initially based on fraud and mis-representation. On basic principles, this contention cannot be accepted. No party can be heard in a court of law to assert that although I have obtained a certain benefit by fraud or misrepresentation, I would still be entitled to the benefit of the transaction even if I had not perpetrated fraud or misrepresentation.

10.5 The second infirmity is on the basis of the fact situation which prevailed at the time of selection/appointment. The respondent has pointed out in the affidavit-in-reply that in fact 30 candidates were selected and consequent appointments made on the basis of evaluation of the qualifications of the candidates, and this evaluation was necessarily based upon the marks obtained by the candidates in their respective qualifying examinations. In the case of most of the candidates where qualifications were new S.S.C. examination, the marks obtained by each candidate at the said examination was one of the major factors which weighed in the ultimate evaluation for the purpose of selection/appointment. To meet with this contention on the part of the petitioner, the respondent has pointed out in the affidavit-in-reply that had the petitioner presented the mark sheet showing 426 marks, he would certainly not have been selected for appointment, inasmuch as the last person selected at Sl. No. 30 had obtained 61.55 marks [in the internal evaluation] whereas the petitioner would be placed at Sl. No. 65 on being allowed 59.30 marks [in the internal evaluation]. Thus, even this submission must fail.

11. Learned counsel for the petitioner then sought to content that the impugned orders at Annexures 'C' and 'G' proceed on the basis that the petitioner had in fact produced a mark sheet showing that he had obtained 486 marks, and that if the authorities cannot establish this assertion, no adverse inference can be drawn against the petitioner. This contention is totally misconceived inasmuch as it is not the department or the authorities or the employer who are required to produce the mark sheet which was actually submitted by the petitioner and relied upon by him at the selection/appointment stage. This is merely a hypothetical submission with a view to circumvent the findings of facts that the petitioner had obtained the selection/appointment by fraud and/or

misrepresentation. It requires to be noted that there is absolutely no controversy or that no contrary case has ever been pleaded by the petitioner in any of the proceedings taken earlier. The petitioner had never contended or submitted that his selection and appointment was not based on the basis of 486 marks. Further more, the petitioner has not even pleaded that the selection and appointment was on the basis of some other mark sheet showing some other marks [except 486]. Even otherwise, this contention requires to be dispelled by observing that it is not the department which is required to establish that the petitioner had obtained his selection/appointment on the basis of 486 marks, for the simple reason that if the true marks obtained by the petitioner in the new S.S.C. examination, viz.. 426, had ever been taken into consideration by the authorities, he could not possibly have been selected.

12. Learned counsel for the petitioner also submitted on the basis of paragraph 8 (iv) of the petition that his selection must be deemed to have been on the basis of 426 marks, inasmuch as that was the mark sheet actually submitted by him at the time of application/selection stage.

12.1 This submission supposed to have been made in the petition and sought to be amplified during the arguments, is sought to be supported by Annexures 'H' and 'I' to the petition, which are letters calling upon the District Primary Education Officer to furnish the petitioner with the record pertaining to his application and selection, including the true copies of the certificates taken into consideration. This aspect has already been dealt with hereinabove. To reiterate, had the petitioner submitted a mark sheet containing 426 marks, he would not have been eligible for selection/appointment.

13. In the premises aforesaid, none of the contentions raised by the learned counsel for the petitioner are sustainable, and consequently, there is no substance in he present petition. This petition is, therefore, dismissed and rule is discharged with costs.

(Y.B. BHATT, J.)
mathew